

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)	
)	MM Docket No. 04-312
Amendment of the Television Table of)	RM No. 11049
Allotments to Delete Noncommercial)	
Reservation of Channel *39, 620-626 MHz,)	
Phoenix, Arizona, and to Add)	
Noncommercial Reservation on Channel 11,)	
198-204 MHz, Holbrook, Arizona)	

To: The Commission

APPLICATION FOR REVIEW

I. INTRODUCTION

NBC Telemundo Phoenix, Inc. (“NBC Telemundo”) and Community Television Educators, Inc. (“CTE”) (collectively, the “parties”), by their attorneys and pursuant to Section 1.115 of the Commission’s Rules, 47 C.F.R. § 1.115 (2003), hereby submit this application for review of the action of the Media Bureau’s Video Division, acting under delegated authority, denying the parties’ joint motion to change the *ex parte* status of the above-captioned proceeding from “restricted” to “permit-but-disclose” (the “Motion”). See Letter dated September 8, 2004, from Chief, Video Division, Media Bureau, to NBC Telemundo Phoenix, Inc. and Community Television Educators, Inc. (Ref. No. 1800E3-JLB) (the “Ruling”). As we demonstrate herein, the denial of the Motion was based on an inapplicable Commission rule and is in conflict with established Commission precedent. Accordingly, the parties request the Commission to grant the Motion and change this proceeding to permit-but-disclose status, which will facilitate a fuller exchange on the issues and lead to a more complete record.

II. BACKGROUND

On August 7, 2003, the parties filed a Joint Petition to Amend the Television Table of Allotments (“Joint Petition”). The purpose of the Joint Petition is two-fold: (1) to introduce a full-power Spanish-language competitor to Univision in Phoenix, the nation’s ninth-largest Spanish-language television market and the *only* market among the top ten Hispanic Designated Market Areas lacking such a full-power competitor to Univision and (2) to preserve the only full-power, over the air television service, which can no longer be sustained as a commercial outlet, to the community of Holbrook. In order to accomplish these publicly beneficial results, the Joint Petition requests that the Commission delete the noncommercial reservation of Channel *39 in Phoenix (licensed to CTE), reserve Channel 11 in Holbrook (licensed to NBC Telemundo), modify NBC Telemundo’s license to specify Channel 39, and modify CTE’s license to specify Channel *11.

On August 6, 2004, the Commission, through its Video Division, adopted a *Memorandum Opinion and Order and Notice of Proposed Rule Making* (“NPRM”) in which the Division ruled (i) that Section 1.420(h) governing channel exchanges between commercial and noncommercial television station licensees was inapplicable to the proposal, but (ii) that it may possible to effectuate the parties’ proposal through a rule making proceeding pursuant to Section 316 of the Communications Act to amend the television table of allotments and modify the parties’ licenses if the public interest, convenience and necessity would be served thereby. Pursuant to Section 1.1208 of the Commission’s rules, rule making proceedings to amend the table of allotments are restricted proceedings for purposes of the *ex parte* rules, and the NPRM so provides. 47 C.F.R. § 1.1208 (2003). As the NPRM makes clear, however, the outcome of this

proceeding will be determined based on an analysis of a number of public interest considerations that transcend the specific rights and responsibilities of the individual parties and have the potential to bring substantial benefits to affected groups who are not parties to the proceeding. Accordingly, because they believed the resolution of this proceeding would benefit from a more open process, the parties filed the Motion on August 26, 2004.

III. THE COMMISSION HAS ABSOLUTE DISCRETION TO CHANGE THE EX PARTE STATUS OF THIS PROCEEDING

The Commission's rules designate certain proceedings as restricted to ensure that the agency conducts its adjudications in a manner that preserves fairness and the appearance of fairness to the parties.¹ Where proceedings involve policy issues and determinations beyond the rights of individual parties, however, the Commission's rules typically classify such proceedings as permit-but-disclose rather than restricted.² Informal rule makings, for example, are designated permit-but-disclose proceedings under the Rules because they "often involve a need for continuing contact between the Commission and the public to develop policy issues."³

The Commission also recognizes that a particular proceeding may involve both a determination of individual rights and responsibilities *and* a determination of important policy considerations that have broader applicability. In such cases, the public interest may be better served by facilitating the free flow of information to the Commission and its staff that is characteristic of informal rule making proceedings.⁴ Similarly, in

¹ See Amendment of 47 C.F.R. §. 1.1200 *et. seq. Concerning Ex Parte Presentations in Commission Proceedings*, 12 FCC Rcd 7348, 7351-52 (1997) ("*Ex Parte Report*").

² *Id.* at 7358.

³ *Id.* at 7358-59; see 47 C.F.R. 1.1206(a)(1) (2003).

⁴ See, e.g., FCC Public Notice, *Satellite Space Applications Accepted for Filing*, 2003 LEXIS 3721 (rel. July 3, 2003). The Commission changed the *ex parte* status of this proceeding from restricted to

proceedings involving interpretations of FCC rules and decisions that have applicability beyond the parties, the Commission may conclude that a more open process is preferable.⁵ For these reasons, the Commission's rules expressly authorize the Commission or its staff to modify the *ex parte* status of a particular proceeding.

Specifically, Section 1.1200(a) of the Commission's rules grants to the Commission and its staff the "discretion to modify the applicable *ex parte* rules by order, letter or public notice."⁶ Note 2 to Section 1.1208 of the Commission's Rules provides the standards to be applied by the Commission or its staff in determining whether to modify the *ex parte* status of a particular proceeding:

[c]onsistent with §1.1200(a), the Commission or its staff may determine that a restricted proceeding not designated for hearing involves primarily issues of broadly applicable policy rather than the rights and responsibilities of specific parties and specify that the proceeding will be conducted in accordance with the provisions of §1.1206 governing permit-but-disclose proceedings.⁷

permit-but-disclose "[b]ecause these applications present complex, interrelated legal, technical and policy issues associated with the implementation of direct broadcast satellite systems, and because a change in the *ex parte* status would facilitate a transparent resolution of these issues . . ."; *see also* FCC Public Notice, *Application of Skybridge L.L.C. for Authority to Launch and Operate the Skybridge System and Its Requested Amendment of Parts 2 and 25 of the Commission's Rules to Permit Operation of NGSO FSS Systems Co-frequency with GSO and Terrestrial Systems in the Ku Band and to Establish Technical Rules Governing NGSO and FSS Operations in this Band*, 13 FCC Rcd 11076 (1998). In the latter proceeding, the FCC changed the *ex parte* status of the proceeding from restricted to permit-but-disclose because the Skybridge application "raises complex technical, legal and policy issues, making it essential that the Commission obtain the most current information available, subject to appropriate procedural safeguards." The Commission further reasoned that a change in *ex parte* status was required "to assist the Commission in developing a complete record on which a well-reasoned decision can be made . . ."). *Id.* at 11076.

⁵ See, e.g., FCC Public Notice, *Change in Ex Parte Status of the State of Tennessee's, Education Networks of America's, and Integrated Systems and Internet Solutions, Inc.'s Requests for Review of the Decision of the Universal Service Administrative Company with Regard to the State of Tennessee's Request for Discounts Pursuant to Section 254 of the Communications Act*, 14 FCC Rcd 7707, 7707 (1999) (changing status from restricted to permit-but-disclose because "[t]hese proceedings raise issues involving interpretation of the Commission's rules and decisions with regard to the schools and libraries program that have application broader than to just these parties").

⁶ 47 C.F.R. § 1.1200(a) (emphasis added).

⁷ 47 C.F.R. § 1.1208, n.2.

The Commission and its staff, including staff of the Media Bureau,⁸ have frequently exercised this authority to change the *ex parte* designation of restricted proceedings involving the rights of specific parties that have broader applicability to “permit a fuller exchange on the issues under consideration”⁹ and to “provide an opportunity for all interested parties to receive notice of various technical, legal and policy issues raised.”¹⁰

IV. THE PHOENIX/HOLBROOK RULE MAKING WOULD BENEFIT SUBSTANTIALLY FROM PERMIT-BUT-DISCLOSE STATUS

As the parties argued in the Motion, the Phoenix/Holbrook rule making presents a classic example of a proceeding that involves both public interest determinations with broader applicability and, potentially, the determination of individual rights. In particular, while the NPRM duly notes the core legal questions at issue in the proceeding, such as the Section 307(b) analysis,¹¹ the overwhelming practical benefits of the proposal are not fully explored in the NPRM and cannot be until the record is developed. These benefits include, among others, the introduction of meaningful competition in Spanish-language programming in Phoenix, the preservation of Holbrook’s only full-power television station, and NBC Telemundo’s commitment to increase locally produced Spanish language news if the proposal is granted. The value of these benefits to the

⁸ See FCC Public Notice, *Application of Dotcast, Inc. for Approval of System for Insertion of Non-Video Data Pursuant to Section 73.682*, “Permit But Disclose” *Ex Parte* Status Accorded, 17 FCC Rcd 6109 (2002).

⁹ See, e.g., FCC Public Notice, *Office of Engineering and Technology Declares Utsarcom and Drew University Request for Waiver of Part 15 for Operation in the 1910-1920 MHz Band to be a “Permit-But-Disclose” Proceeding for Ex Parte Purposes*, 15 FCC Rcd 23562, 23562 (OET 2000); see also FCC Public Notice, *Office of Engineering and Technology Declares Safeview Request for a Waiver of Part 15 to be a “Permit-But-Disclose” Proceeding for Ex Parte Purposes*, ET Docket No. 04-373, DA 04-3038 (rel. Sept. 22, 2004); FCC Public Notice, *Office of Engineering and Technology Declares Wavebounce Request for a Waiver of Part 15 to be a “Permit-But-Disclose” Proceeding for Ex Parte Purposes*, ET Docket No. 04-374, DA 04-3039 (rel. Sept. 22, 2004).

¹⁰ See, e.g., *Bell Atlantic Telephone Companies Revisions to Tariff* FCC Nos. 1 and 11, 16 FCC Rcd 12967, 12985 (CCB 2001); see also *supra* notes 4 & 5.

¹¹ NPRM ¶ 9.

affected constituencies, including Phoenix’s substantial Latino population and the residents of Holbrook, can best be assessed by encouraging these constituencies to participate fully in this proceeding without the procedural formalities and constraints imposed in a restricted proceeding. Indeed, these formalities and constraints may well act as a disincentive or obstacle to participation by these parties. In this respect, the proceeding is indistinguishable from informal rule making proceedings in which the FCC seeks input from the broadest spectrum of potentially affected parties. As the Commission observed in the *Ex Parte Report*, “rulemakings, unlike adjudications, often involve a need for continuing contact between the Commission and the public to develop policy issues. . . . Further, . . . a permit-but-disclose procedure in rulemakings gives interested persons fair notice of presentations made to the Commission and ensures the development of a complete record.”¹²

V. THE VIDEO DIVISION’S DENIAL OF THE MOTION DID NOT CONSIDER IMPORTANT LEGAL ISSUES PRESENTED BY THIS PROCEEDING AND RELIED ON AN INAPPLICABLE RULE

The Video Division disagreed with the parties’ view that this proceeding involves both public interest and policy determinations with broader applicability and the determination of individual rights. Specifically, the Division noted that the issue of whether the proposed allotment changes comply with the Commission’s long-standing allotment policies “has no broad policy implications and any decision would have little, or any, practicability, to a similar request involving different communities.”¹³ The parties acknowledge that the factual circumstances presented in this proceeding are unique and are very unlikely to be replicated in any other television market. However, a number of

¹² *Ex Parte Report* at 7359.

¹³ Ruling at 2.

the legal issues are novel and have the potential for wider applicability in other types of allotment proceedings.

For example, the NPRM, citing the allotment policy established in the 1960s of endeavoring to allot two noncommercial channels to the “very largest cities,” asks whether the dereservation of one of two noncommercial channels allotted to the city of Phoenix is consistent with that policy.¹⁴ Yet in conjunction with the digital transition, the Commission *already* had made a policy decision to delete *all* vacant NTSC allotments (commercial *and* reserved), including the very reserved Channel 39 at issue in this proceeding, and would have done so if an application had not been filed for this allotment just weeks before the deadline established in the *Sixth Further Notice of Proposed Rule Making*.¹⁵ The Commission reached this policy decision even in the face of a specific plea to preserve all vacant noncommercial allotments because “the DTV Table replaces existing vacant noncommercial NTSC allotments with new noncommercial reserved DTV allotments where feasible”¹⁶ The Commission further justified the deletion of vacant reserved allotments on the ground that “[a]fter the transition, we also will consider establishing additional noncommercial reserved allotments on recovered spectrum for

¹⁴ NPRM ¶ 9. It should be emphasized that the parties’ proposal would not result in a net reduction of reserved noncommercial allotments in the Phoenix Designated Market Area, which would still have a total of three such allotments, including current reserved allotments in Phoenix (KAET, Channel *8, licensed to the Arizona Board of Regents (Arizona State University); Channel *16, Flagstaff, for which applications have been pending since 1996; and the proposed reservation of Channel 11, Holbrook). In addition, Trinity Broadcasting of Arizona, Inc. operates Channel 21 noncommercially. A fourth reserved allotment in the Phoenix DMA, Channel *18 at Holbrook, will be deleted as a vacant NTSC allotment pursuant to the Commission’s *Sixth Report and Order* in the DTV proceeding. See *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Report and Order, 12 FCC Rcd 14588, 14639 (1997) (“*Sixth Report and Order*”); *Advanced Television Systems and Their Impact upon the Existing Television Broadcast Service*, Sixth Further Notice of Proposed Rule Making, 11 FCC Rcd 10968, 11013 (1996) (“*Sixth Further Notice of Proposed Rulemaking*”).

¹⁵ *Sixth Further Notice of Proposed Rule Making*, 11 FCC Rcd at 11013.

¹⁶ *Sixth Report and Order*, 12 FCC Rcd at 14639.

those existing vacant noncommercial allotments that cannot be replaced at this time.”¹⁷

Clearly, the “long-standing allotment policies” cited in the NPRM have been affected by the digital transition. This decisionally significant change in the Commission’s allotment policies, which is not acknowledged in the NPRM, must be addressed in this proceeding and may be relevant to future proceedings.

The Division also disagreed with the parties’ contention that the public interest would be served by permit-but-disclose status because such status would encourage the multiple affected constituencies to participate fully without the procedural formalities and constraints imposed in a restricted proceeding. In rejecting this basis for changing the status of the proceeding, the Division argued that the Commission has adopted a special procedure for restricted proceedings involving new or modified station license applications “where comments from viewers are to be encouraged.”¹⁸ Citing the *Ex Parte Report*, the Division concluded that “[u]nlike other written submissions in these types of proceedings, the Commission held that comments from viewers need not be served on the applicant, and that submission of the informal comments would not automatically confer party status on the viewer [footnote omitted]. Thus, we see no impediment to full viewer participation in this restricted proceeding.”¹⁹

The rule cited and relied upon by the Division, however, by its terms applies *only* to applications for new or modified broadcast licenses, renewals of such licenses, and transfers and assignments of such licenses, which are subject to special local public

¹⁷ *Id.*

¹⁸ Ruling at 2.

¹⁹ *Id.*

notice requirements in which the public is invited to comment on the application. As the Commission explained in the *Ex Parte Report*:

A special provision applies in the Mass Media context. The Commission's rules require broadcast stations to invite listeners and viewers to submit comments when the Commission is considering new or modified broadcast station license applications or applications for renewals or transfers of such licenses. *See* 47 C.F.R. § 73.3580. It would be inconsistent with the spirit of this requirement to take any action that might discourage such informal comments from viewers or listeners or otherwise overly formalize the process. Accordingly, we make clear that unlike other written submissions about applications (which under our amended rules, must be served on the applicant and any other parties) comments from individual viewers or listeners regarding a pending broadcast application need not be served on the applicant.²⁰

This limited exception to the *ex parte* rules clearly was never intended to apply to allotment proceedings, which are not subject to the special local public notice provisions of Section 73.3580 of the Rules. Moreover, it would be grossly unfair to apply a relaxed *ex parte* rule to only some of the parties in this case, particularly if the strictest rules were applied only to the proponents of the allotment changes. Therefore, the Division's reliance on this rule is misplaced and should be reversed.²¹

VI. CONCLUSION

Because a change to permit-but-disclose status will encourage greater participation by potentially affected constituencies and foster a fuller exchange on the issues under consideration, particularly with respect to the beneficial impact of the proposal on those constituencies, the parties respectfully request the Commission to grant this application for review and change the *ex parte* status of this proceeding from restricted to permit-but-disclose.

²⁰ *Ex Parte Report*, 12 FCC Rcd at 7354; *see* 47 C.F.R. §§ 1.1202, Note 4, 1.1204(a)(8) (2003).

²¹ In contrast to cases in which the Commission has denied requests to change *ex parte* status, this is not a complaint proceeding; nor does it involve an adjudication. *See, e.g., AT&T Corp. v. Business Telecom, Inc.*, 16 FCC Rcd 18159 (2001) (denying request to alter status of Section 208 formal complaint proceeding). Further, both parties to the proceeding joined in making the request.

Respectfully submitted,

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Dated: October 8, 2004

CERTIFICATE OF SERVICE

I, Theresa L. Rollins, do hereby certify that a copy of the foregoing “Application for Review” was served by electronic mail this 8th day of October, 2004, on the following:

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